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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CRELENCIO CHAVEZ and JOSE ZALDIVAR, an individual and on behalf of all others similarly situated,

Plaintiff,

vs.

LUMBER LIQUIDATORS, INC. a Delaware Corporation; and DOES 1 through 20, inclusive,

Defendant.

Case No. 3:09-CV-04812 SC

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR CONDITIONAL COLLECTIVE CERTIFICATION AND TO FACILITATE NOTICE PURSUANT TO 29 U.S.C. §216(B)

Date: January 21, 2011
Time: 10:00 am
Dept: Courtroom 1, 17th Floor

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I. INTRODUCTION

Plaintiff Jose Zaldivar ("Plaintiff") has filed a motion for conditional certification of a collective action (the "Motion") pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. Section 216(b), on behalf of certain current and former employees of Defendant Lumber Liquidators, Inc. ("Defendant"). The Motion should be denied for the following reasons:

First, Sections 216(b) and 256 of the FLSA make clear that in order to pursue a collective action, a named plaintiff must file a written consent with the court. This requirement is unequivocal and an essential precedent to proceeding with an FLSA collective action. Plaintiff here has failed to file any written consent. As a result, there is no collective action pending before the Court, and it would be entirely inappropriate to conditionally certify such an action or provide notice to the proposed collective action members given Plaintiff's failure to comply with this basic statutory prerequisite.

Second, Plaintiff's failure to file a written consent during the 16 months that this case has been pending has placed him and his attorneys in an irremediable conflict of interest because of the different statute of limitations applicable to an individual action versus a collective action under the FLSA. The limitations period on an individual action extends back from the filing of the Complaint, whereas the limitations period on a collective action extends back from the date on which the written consent is filed with the Court. If Plaintiff were to file a written consent now in order to commence a collective action, he would lose as much as 16 months worth of potential monetary recovery on his individual FLSA claim. Plaintiff's counsel cannot ethically advise their client to purposefully reduce his own potential monetary recovery in order to maintain a collective action on behalf of a group of employees Plaintiff's counsel do not even represent. Plaintiff's counsel cannot sacrifice their client's personal interests in the hopes of recovering greater attorneys' fees through a proposed collective action. Given this ethical conflict, the Court should not allow Plaintiff to proceed with a collective action at this point.

Third, Plaintiff has not presented any evidence showing that he was not correctly paid overtime under the FLSA. Plaintiff also has not presented any evidence showing the existence of "similarly situated" employees. Instead, Plaintiff has repeatedly mischaracterized and mis-cited

Defendant's deposition testimony and generally failed to present admissible evidence supporting his contention that Defendant miscalculated the overtime pay for Plaintiff and other alleged similarly situated employees. Absent such evidence, conditional certification should be denied.

Fourth, conditional certification requires evidence that other similarly situated employees desire to opt-in and participate in the action. This is a requirement that cannot be overlooked by the Court when considering whether to grant conditional certification and send notice to more than 1,000 current and former employees. Here, Plaintiff and his co-plaintiff, Crelencio Chavez (together, "Plaintiffs"), worked for Defendant a combined total of approximately 12 years and know many other employees of Defendant. Plaintiff admittedly spoke with many other employees about this lawsuit and his overtime claim. Despite these facts, and the fact that this case has been pending for 16 months and more than 1,000 potential opt-ins exist, Plaintiff has not submitted a *single* declaration or opt-in consent form from any of Defendant's current or former employees. The Court should deny conditional certification because there is no evidence that other employees desire to opt-in.

Even if the Court could grant conditional certification given these circumstances (which Defendant asserts it cannot), the remaining relief requested by Plaintiff's Motion should be denied. Specifically, the Court should deny Plaintiff's request for equitable tolling because he has failed to show that (a) Defendant engaged in any wrongful conduct that impeded the exercise of his rights, or (b) extraordinary circumstances beyond his control made it impossible for him to timely file his claim. In addition, the Court should deny the requested three-year notice period because Plaintiff has not presented evidence of a willful violation that would extend the normal two-year statute of limitations period under the FLSA. The Court should also deny Plaintiff's request that notice be posted in the stores, as opposed to being mailed only, and should deny the requested 120-day notice period, as there is no demonstrated reason to exceed the standard, reasonable 60-day notice period.

Finally, if the conditional certification is granted, the Court should order the Parties to meet and confer regarding a mutually agreeable, neutral proposed form of notice and further order that notice be sent by a neutral third party administrator, as opposed to providing Plaintiff's

counsel with employee contact information, which would only encourage Plaintiff's counsel to improperly solicit putative collective action members.

II. FACTUAL SUMMARY[1]

A. Procedural History

Plaintiffs originally filed this action in Alameda County Superior Court on September 3, 2009. Meckley Decl. ¶2; Ex. 1. Defendant removed the action to this Court on October 9, 2009 based upon federal question jurisdiction under the FLSA. Meckley Decl. ¶2.

Plaintiffs' original Complaint included a claim by Plaintiff and "Class 3" for alleged unpaid overtime in violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §207. Ex. 1, ¶¶39-47. Plaintiffs filed a First Amended Complaint on November 24, 2009 and filed a Second Amended Complaint ("SAC") on January 22, 2010 (Court Dkt. #'s 12 and 20, respectively). Plaintiffs' SAC included a claim by Plaintiff and "Class 3" for alleged unpaid overtime in violation of the FLSA. SAC ¶¶39-45. "Class 3" was defined in the SAC as:

> "All past and current employees of DEFENDANTS classified by DEFENDANTS as non-exempt retail store employees (including, but not limited to assistant store managers, sales associates, and warehouse associates) and employed in the United States from September 3, 2006 through the present, who were paid overtime wages and were also paid commission wages and/or other non-discretionary incentive pay or bonuses".

SAC ¶18.

In the Parties' Joint Case Management Conference Statement filed on March 12, 2010, the Parties identified one of the legal issues in the case as: "whether Plaintiff can maintain a collective action on behalf of 'similarly situated' non-exempt employees under the FLSA." (Court Dkt. #26, p.3) In this Joint CMC Statement, Defendant stated that it "denies Plaintiff's allegations … [and] further denies that any of either Plaintiff's claims may be … maintained as a collective action under the Fair Labor Standards Act." *Id.*, p. 2.

[1] Unless otherwise specified, any reference to "Plaintiff" singular refers to Plaintiff Zaldivar. Citation to deposition testimony is in the format "[deponent's last name] Depo. [page]:[line]". Citation to declarations are in format "[declarant's last name] Decl. ¶[paragraph number]".

B. The Parties' Discovery

To date, the parties have conducted significant discovery. Plaintiffs Chavez and Zaldivar have been deposed. Meckley Decl. ¶¶4, 5. Plaintiff has taken a deposition of Defendant's corporate designee under Rule 30(b)(6). Meckley Decl. ¶6. Both sides have exchanged written interrogatories and requests for production of documents -- Plaintiff has produced almost 200 pages of hardcopy documents, and Defendant has produced approximately 375 pages of hardcopy documents and also produced electronic time entry and payroll data for 25% of the putative class and collective action members. Meckley Decl. ¶7.

C. Plaintiff Jose Zaldivar

Plaintiff was hired by Defendant in July of 2007. SAC ¶9; Plaintiff's Depo. 11:19-24 (attached as Exhibit 3 to Meckley Decl.). His employment ended in June of 2010. Plaintiff's Depo. 11:25-12:2. Plaintiff was paid an hourly rate of pay and was eligible for overtime. Plaintiff's Depo. 41:21-42:1. Plaintiff understood that he could receive some type of commissions but did not understand any details regarding his commissions. Plaintiff's Depo. 34:13-17, 161:14-25.

> Q.: So what was your understanding as to how your commissions worked at Lumber Liquidators?
> Mr. Lee: Objection. Vague and ambiguous.
> A.: How – I was not sure how they worked. Up to date, I don't know how they calculate it or how it works, exactly.

Plaintiff's Depo. 161:14-19.

> Q.: And when you started to receive commissions, did you ever try to figure out how it was that your commissions were calculated?
> A.: No. Because I asked. I asked Rene and other people, and they had an idea of what they thought how it worked, but it didn't seem exact. I wasn't sure. I just never questioned it.

Plaintiff's Depo. 162:9-15.

> Q.: Did you ever see any commission plan?
> A.: No.

Plaintiff's Depo. 165:7-8.

Plaintiff testified in his deposition that he understood in this lawsuit he was suing Defendant for "not paying [him] overtime", but when questioned about his understanding of the actual bases for this claim, Plaintiff did not mention anything about the supposed failure to include his commissions/bonuses in the calculation of his overtime rate of pay. Plaintiff's Depo. 247:25-250:4.

III. LEGAL ARGUMENT

A. Plaintiff Cannot Proceed with A Collective Action Under the FLSA Because He Has Failed to File A Written Consent with the Court.

Section 216(b) of the FLSA states in pertinent part:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. ... An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. **No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.** (emphasis added)

Thus, the plain language of the statute makes clear that a collective action under Section 216(b) of the FLSA cannot proceed unless and until the named plaintiff's written consent to the action has been filed with the Court. *Gray v. Swanney-McDonald, Inc.*, 436 F.2d 652, 655 (9th Cir. 1971); *see also Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 756, n. 19 (9th Cir. 1979).

> "The statutory language is clear. When plaintiffs have filed a 'collective action,' under Section 216(b), all plaintiffs, ***including named plaintiffs***, must file a consent to suit with the court in which the action is brought." (emphasis added)

Bonilla v. Las Vegas Cigar Company, 61 F.Supp.2d 1129, 1132-33 (D. Nev. 1999).

In the present case, Plaintiff did not file a written consent in the Alameda County Superior Court, where this action originally was filed. Meckley Decl. ¶3, Ex. 2. Plaintiff also has failed to file a written consent with this Court. Because no written consent has ever been filed, Plaintiff cannot be a "party plaintiff to any [collective] action" pursuant to Section 216(b). Absent any written consent to this action being filed, there is simply no "collective action" presently pending

before this Court. Plaintiff's motion for conditional certification thus has no statutory basis and must be denied on this ground.

B. Given Plaintiff's Failure to File A Written Consent, Plaintiff Faces an Irremediable Conflict Between His Personal Interests and the Interests of the Proposed Collective Group of Employees That Precludes Him from Proceeding with Any Collective Action.

Plaintiff's failure to file a written consent places him and his attorneys in an irremediable conflict of interest with the proposed collective group of employees he seeks to represent. This conflict exists because of the FLSA's different rules regarding the running of the statute of limitations on an individual versus a collective action claim.

The statute of limitations for an FLSA claim is set forth in 29 U.S.C. §256, which states in pertinent part as follows:

> In determining when an action is commenced for the purposes of section 255 of this title, an action [under the FLSA] … shall be considered to be commenced on the date when the complaint is filed; except that in the case of a collective or class action instituted under the Fair Labor Standards Act of 1938, as amended … it shall be considered to be commenced in the case of any individual claimant –
>
> (a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint **and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought**; or
>
> (b) **if such written consent was not so filed** or if his name did not so appear - **on the subsequent date on which such written consent is filed in the court in which the action was commenced**. (emphasis added)

Whether an action is "commenced" under the FLSA for purposes of the statute of limitations depends on whether it was instituted as an individual or a collective action. 29 U.S.C. §256.

The Ninth Circuit has explained that an individual, non-collective action is "considered to be commenced on the date when the complaint is filed." *Gray*, 436 F.2d at 655; *see also Thomas v. Talyst, Inc*., 2008 WL 570806 (W.D. Wash. 2008) ("Non-collective actions are deemed "commenced" for purposes of an individual claimant's statute of limitations when the complaint is filed on behalf of that claimant.").

In contrast, a collective action is commenced *only* when the named plaintiff files his or her written consent to become a party plaintiff. *Ketchum v. City of Vallejo*, 523 F.Supp.2d 1150

(E.D. Cal. 2007). In *Ketchum*, the named plaintiffs filed suit against the defendant on behalf of themselves and "all others similarly situated," alleging violations of the FLSA. Defendants moved for summary judgment, arguing that the named plaintiffs' claims were time barred due to their failure to file written consent forms with the court within the FLSA's two-year statute of limitations. *Ketchum*, 523 F.Supp. at 1154. Plaintiffs argued that their failure to file written consents was of no consequence, given their status as named plaintiffs in the suit, and, in the alternative, that they were not required to file consents because their action was "not a collective action," but rather, "a joint action alleging individual claims." *Id*. The court in *Ketchum* emphasized the importance of the named plaintiffs' compliance with the statutory requirements of Sections 216(b) and 256, stating: When a collective action is filed "all plaintiffs, ***including named plaintiffs***, must file a consent to suit with the court in which the action is brought." *Ketchum,* 523 F.Supp.2d at 1155 (emphasis added). Citing the Seventh Circuit's ruling in *Harkins v. Riverboat Services, Inc*., 385 F.3d 1099, 1101 (7th Cir. 2004), the *Ketchum* court explained:

> The statute is unambiguous: if you haven't given your written consent to join the suit, or if you have but it hasn't been filed with the court, you're not a party. It makes no difference that you are named in the complaint, for you might have been named without your consent. The rule requiring written, filed consent is important because a party is bound by whatever judgment is eventually entered in the case, and if he is distrustful of the capacity of the 'class' counsel to win a judgment he won't consent to join the suit.

Ketchum, 523 F.Supp.2d at 1155.

The *Ketchum* court rejected plaintiffs' assertions that their action was not a collective action, citing the "plain language of the Complaint," which contained an entire section entitled "Collective Action Allegations". *Id*. Because plaintiffs had in fact brought the action as a collective action, but had failed to file timely consents to suit, the *Ketchum* court held that the plaintiffs had failed to properly commence the action within the two year statute of limitations and the plaintiffs' FLSA claim was time-barred. *Id*. at 1156.

The court in *Bonilla v. Las Vegas Cigar Co*., 61 F.Supp.2d at 1132-33, reached an identical conclusion, ruling that the claims of those named plaintiffs who had failed to timely file written consents were barred by the FLSA statute of limitations. *Id*. at 1140. The *Bonilla* court

held that for purposes of a collective action, while "consents may be filed after the complaint, the action is not deemed commenced with respect to each individual plaintiff until his or her consent has been filed." *Bonilla*, 61 F.Supp.2d. 1129, citing *Atkins v. General Motors Corp*., 701 F.2d 1124, 1130 n. 5 (5th Cir. 1983) (affirming district court's refusal to allow plaintiffs to intervene where plaintiffs had not opted in before running of statute of limitations).[2]

Here, Plaintiff has failed to file a written consent with the Court. The conflict between Plaintiff and his attorneys, on the one hand, and the proposed collective action members, on the other hand, arises because if Plaintiff were to file a written consent now in order to proceed with a collective action, he would be significantly reducing the value of his own individual FLSA claim by cutting off many months of the statute of limitations on his own claim. Specifically, if Plaintiff were proceeding only on his individual FLSA claim, the statute of limitations on his claim would extend back two years prior to the filing of the Complaint – *i.e*., to September 3, 2007.[3] If, however, Plaintiff were to file a written consent after receiving Defendant's Opposition (for example, January 3, 2011) in order to commence a "collective action" on behalf of Defendant's non-exempt employees, the two-year statute of limitations on his own claim would extend back two years from the date on which his consent is filed, *i.e*., to only January 3, 2009 (if he could prove "willfulness", the statute of limitations for his claim would extend back to January 3, 2008).

Plaintiff's employment with Defendant began in July 2007. If he were to file a written consent now in order to proceed with a collective action, on an FLSA two-year statute of limitations, he would lose 16 months worth of potential monetary recovery on his individual claim (from 9/3/07 versus 1/3/09), and on an FLSA three-year statute of limitations, he would

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[2] *See also*, *Partlow v. Jewish Orphans' Home of Southern Cal., Inc*., 645 F.2d 757, 760 (9th Cir. 1981) ("It is true that the FLSA statute of limitations continues to run until a valid consent is filed."); *Cash v. Conn Appliances, Inc*., 2 F.Supp.2d 884, 897 (E.D. Tex. 1997) (stating that in collective actions, statute of limitations continues to run until consent filed); *Salazar v. Brown, Jr*., No. G87-961, 1996 WL 302673, at *10-11 (W.D. Mich. 1996) (analyzing cases which held that statute of limitations under Section 256 is tolled when written consents are filed for each named plaintiff); *Graham v. City of Chicago*, 828 F.Supp. 576, 583 (N.D. Ill. 1993) (finding that complaint commences when consent filed).

[3] If Plaintiff could demonstrate "willfulness" under the FLSA, the statute of limitations on his individual claim would extend back three years from the filing of the Complaint, to September 3, 2006.

lose 6 months worth of potential monetary recovery on his individual claim (7/07 versus 1/3/08). It is also important to recall that recovery under the FLSA (as opposed to under California law) includes potential *liquidated damages*, that in effect double the amount of unpaid overtime wages owed. The conflict here is obvious. Plaintiff's attorneys cannot ethically advise their own client to purposefully reduce his own potential monetary recovery in order to maintain an action on behalf of a group of people who Plaintiff's attorneys do not even represent. In doing so, Plaintiff's attorneys would be sacrificing their own client's potential monetary recovery in the hopes of themselves recovering greater attorneys' fees through a proposed collective action. Moreover, Plaintiff's attorneys cannot ethically advise Plaintiff regarding this situation -- Tafoya & Garcia themselves have a conflict of interest, given their failure to file any written consent on behalf of Plaintiff during the 16 months that this case has been pending.

Given these conflict issues, Defendant asserts that Plaintiff should not be allowed to proceed with a collective action at this point. This Court should not permit Plaintiff's attorneys to run rough shod over the interests of their own actual clients in order to increase their potential attorneys' fees. Defendant requests that if (as Defendant expects) in response to this Opposition, Plaintiff belatedly attempts now to file a written consent form, the Court should not accept such filing as a valid commencement of a collective action unless and until, at the very least, the Court conducts a detailed evidentiary inquiry into whether and how the conflicts of interests described herein have been addressed and resolved.

C. Plaintiff Has Failed To Present Evidence Demonstrating That His Own Overtime Was Miscalculated Under the FLSA.

An FLSA violation exists only if an employee *both* worked overtime *and* received non-discretionary incentive compensation *during the same workweek* and the employee's non-discretionary incentive compensation was not included in calculating his or her regular rate of pay *for that specific workweek*. *See* 29 C.F.R. §§778.102, 778.109, 778.118. If, for example, an employee earns and is paid non-discretionary incentive compensation during a particular workweek, but does not work any overtime during that particular workweek, there is no violation of the FLSA. *Id*.

Here, Plaintiff has failed to demonstrate that his overtime was not calculated correctly under the FLSA. Plaintiff claims in his declaration that his bonuses/commissions were not included in his regular rate of pay, and in support of this claim he submitted as "Exhibit 1" copies of his wage statements. *See* Plaintiff's Decl. ¶10, Ex. 1. But these wage statements simply do not support Plaintiff's claim. *None* of the wage statements in Plaintiff's Exhibit 1 show him *both* working overtime *and* being paid a sales bonus *during the same workweek*. Defendant's corporate designee testified that bonuses/commissions were typically paid in the third week of the month subsequent to the month in which they were earned. LLI Depo. 79:20-80:1 (attached as Exhibit 5 to Meckley Decl.). Plaintiff submitted wage statements showing that he was paid a sales bonus during the 3/15/09-3/21/09 and 4/12/09-4/18/09 workweek pay periods. Yet Plaintiff did not submit any wage statements showing that he worked overtime during either of the prior months (*i.e.*, February and March 2009). The only wage statements submitted in Plaintiff's Exhibit 1 that show overtime being worked are for workweek pay periods occurring *after* the 3/15/09-3/21/09 and 4/12/09-4/18/09 pay periods in which bonuses were paid. As a result, the wage statements submitted by Plaintiff do not show any FLSA violation at all. Plaintiff filed this lawsuit 16 months ago and the Parties have engaged in significant deposition and documentary discovery – yet, the only evidence Plaintiff can produce in support of his Motion fails to show any inaccuracy in the calculation of his own overtime pay! For this reason, his Motion should be denied.

D. Plaintiff Has Failed To Present Evidence Demonstrating That He Is "Similarly Situated" To Other Putative Collective Action Members.

Plaintiff bears the burden of establishing "that there is some factual basis beyond the mere averments in [the] complaint for the class allegations." *Adams v. Inter-Con Security Systems, Inc.*, 242 F.R.D. 530, 536 (N.D. Cal. 2007). "Unsupported assertions of widespread violations" are insufficient to satisfy this evidentiary requirement. *Evancho v. Sanofis-Aventis U.S. Inc.*, 2007 U.S. Dist. LEXIS 93215, at *7 (D.N.J. Dec. 18, 2007); *Edwards v. City of Long Beach*, 467 F. Supp. 2d 986, 990 (C.D. Cal. 2006). Rather, the law is clear that, even at the notice stage, Plaintiff must satisfy his evidentiary burden, at a minimum, with detailed allegations supported by

admissible evidence. *See, Hall v. Burk*, 2002 WL 413901, at *3 (N.D. Tex. Mar. 11, 2002) (holding that "unsupported assertions of widespread violations are not sufficient" to support conditional certification/notice motion); *Cuzco v. Orion Builders, Inc*., 477 F. Supp. 2d 628, 633 (S.D.N.Y. 2007) (a court requires "more than the uncorroborated statements" of the plaintiff to grant conditional certification); *Morales v. Plantworks, Inc*., 2006 WL 278154, at *1 (S.D.N.Y. 2006) (conclusory allegations or a lack of a nexus with the putative class preclude moving forward on a collective action); *Dreyer v. Altchem Env. Servs., Inc.,* 2006 U.S. Dist. LEXIS 93846, at **5-6 (D. N.J. 2006) (denying notice motion where "plaintiff attache[d] no affidavits … to serve as evidence that the potential class members are 'similarly situated'"). A court must review the pleadings and declarations submitted by the parties to determine whether a plaintiff has carried his burden. *Adams,* 242 F.R.D. at 536. The ultimate conclusion is left to the court's sound discretion. *Hoffman-LaRoche v. Sperling,* 493 U.S. 165, 169 (1989).

Plaintiff argues that a lenient standard applies at the "first stage" of conditional certification. Although the case law does set forth a lenient standard at the notice state, in order to warrant collective action treatment under FLSA a plaintiff still must present admissible evidence showing that he is similarly situated to other employees who are available and willing to opt in. *See Grayson v. K-mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996).

Here, Plaintiff devotes a total of five (5) sentences in his Motion to the argument that he and other non-exempt retail employees are "similarly situated" as a result of an alleged failure to incorporate bonuses/commissions in the calculation of their overtime pay. *See* Motion 3:5-15. His argument rests entirely upon his own declaration and the Rule 30(b)(6) deposition testimony of Defendant's corporate designee, Senior Vice President of Store and Operations, Robert Morrison, which he mis-cites and mischaracterizes.

Plaintiff's "similarly situated" argument fails because it is unsupported by any admissible evidence. First, Plaintiff's reliance on his own declaration is misplaced because (a) as demonstrated above, Plaintiff has not shown that his own overtime was miscalculated, (b) his declaration directly contradicts his deposition testimony, in which he clearly stated that he did not understand how his bonuses were calculated (Plaintiff's Depo. 161:14-19), and (c) his reference

to supposed "personal discussions" with unnamed co-workers in other stores lacks foundation and constitutes inadmissible hearsay.[4] His declaration does not demonstrate that any employee's overtime was incorrectly calculated under the FLSA. Second, Plaintiff has blatantly and misleadingly mis-cited the deposition testimony of Defendant's corporate designee. For example, Plaintiff cites Defendant's testimony for the assertion that Defendant miscalculated overtime for "many of its employees". Motion 3:6-7 (citing LLI Depo. 92:20-94:21). The cited testimony, however, pertains only to the daily overtime requirements unique to California law and neither relates to nor supports Plaintiff's claim that he, let alone any other non-exempt retail employee, was underpaid overtime as a result of the failure to include commissions/bonuses in violation of the FLSA. Plaintiff cites Defendant's testimony for his assertion that non-exempt retail employees received bonuses that were not included when calculating of overtime. Motion 3:8-10 (citing LLI Depo. 98:13-99:25; 107:11-108:5). Yet the cited testimony makes *no reference whatsoever* to whether commissions or bonuses were included in the calculation of the regular rate of pay for overtime purposes, but rather merely describes how non-exempt retail employees were eligible to participate in contests and to receive discretionary commission bonuses. *Id*. As another example, Plaintiff cites Defendant's testimony for the proposition that the Defendant had bonus contests in May 2010, but that "none of the commissions or bonuses were counted towards overtime." Motion 3:10-12 (citing LLI Depo. 100:19-101:2). Once again, however, Plaintiff purposefully and misleadingly mis-cites Defendant's testimony – the cited testimony actually states that the Defendant has held sales contests since it converted to an electronic timekeeping system, but that its Rule 30(b)(6) designee, Mr. Morrison, simply did not know whether contest prizes were incorporated into the regular rate of pay for overtime purposes. *Id*. Mr. Morrison went on to clarify his testimony and stated that, in fact, contest award winnings had been included in the overtime calculation since May 2010. LLI Depo. 127:22-128:23.

Plaintiff also asserts that Defendant "changed its unlawful pay practices in reaction to the filing of this lawsuit". Motion 7:1-2. The cited testimony not only fails to corroborate Plaintiff's

[4] Defendant is concurrently filing formal objections to evidence along with its Opposition.

assertion, but specifically contradicts it:

> Q.: And do you know if the change in the overtime practice that happened in May 2010 -- was that caused by the lawsuit being filed?
> Mr. Meckley: Let me object. To the extent it calls for communications with attorneys or attorney- client privilege, you shouldn't answer with respect to that. If you can answer otherwise.
> The Witness: Yeah. No.
> Q.: You can't answer it?
> A.: No, it wasn't, to your question.
> Q.: It wasn't caused by the lawsuit?
> A.: Correct.

LLI Depo. 86:24-87:11.

Plaintiff also mischaracterizes the evidence regarding Defendant's timekeeping processes by claiming that Defendant used "uniform" timesheets and that "despite state-by-state differences in overtime and labor laws, all the timesheets used the same embedded calculation formulae." Motion 2:16-19. Defendant's corporate designee actually testified that the Defendant (a) used unique California-specific timesheets entitled "Weekly Hours Worked - California Only" that required non-exempt employees to track all meal breaks taken or missed, (b) the unique California timesheets were in use long before Plaintiff filed this action, and (c) the unique California timesheets were designed to comply with California state specific laws. LLI Depo. 58:24-60:6, 62:9-63:5; Exh. 5. Once again, Plaintiff's false assertions regarding Defendant's actual practices are directly contradicted by the evidence in this case. Plaintiff's blatant mischaracterization of the deposition testimony undermines his Motion and confirms the lack of evidence that "similarly situated" proposed collective action members exist.

It is illuminative to contrast the complete absence of evidence here with the quality and quantity of evidence relied upon by the Northern District court in granting conditional certification in *Adams v. Inter-Con Security Systems, Inc*., 242 F.R.D. 530, 536 (N.D. Cal. 2007). In *Adams*, 242 F.R.D. 530, the Northern District court found that the plaintiffs met their burden on conditional certification by submitting detailed allegations of a policy requiring off the clock work, which was supported by 13 declarations (with exhibits) of former and current employees, 2 declarations of former supervisors confirming that policy, and the fact that 383 other employees had opted in before the class had even been conditionally certified. *Id*. at 536.

Unlike the plaintiffs in *Adams*, Plaintiff here offers no evidence demonstrating that he is "similarly situated" to any other proposed collective action members. Despite having litigated this case for almost one and one-half years, Plaintiff has not submitted a single declaration from any other current or former employee showing that they are "similarly situated" with respect to the alleged non-payment of overtime under the FLSA. Nor has Plaintiff submitted a shred of admissible evidence showing that the Defendant violated the FLSA with respect to any employee, including Plaintiff himself. In short, the record is wholly lacking the type of evidence necessary to make the requisite showing that he and the putative collective action members are "similarly situated." The Court should deny Plaintiff's Motion on this basis.

E. The Court Should Deny Conditional Certification Because Plaintiff Has Failed To Offer Evidence Of Any Opt-In Interest By Any Other Employee.

In *Dybach v. State of Fla. Dept. of Corr.*, 942 F.2d 1562, 1567-68 (11th Cir. 1991), the Eleventh Circuit held that, before exercising its power to conditionally certify a collective action, a "district court should satisfy itself that there are other employees of the department-employer who desire to 'opt-in' and who are 'similarly situated' with respect to their job requirements and with regard to their pay provisions." *Dybach* has been followed by many other federal district courts. *See Pfohl v. Farmers Ins. Group*, CV03-3080, 2004 WL 554834, at *1, *10 (C.D. Cal. Mar. 1, 2004) (denying conditional certification where only 13 out of hundreds of possible opt-ins expressed an interest in opting into the suit); *Parker v. Rowland Express, Inc.*, 492 F.Supp.2d 1159, 1166 (D. Minn. 2007) (denying conditional certification where no interest from other opt ins); *Lance v. The Scotts Co.*, No. 04-5270, 2005 WL 1785315, at *9 (N.D. Ill. July 21, 2005) (conditional certification denied where the plaintiff failed to present evidence that others desired to opt in); *Mackenzie v. Kindred Hosps. E., L.L.C.*, 276 F. Supp. 2d 1211, 1220 (M.D. Fla. 2003) (stating that "unsupported expectations that additional plaintiffs will subsequently come forward" are insufficient to justify notice); *Hargrove v. Sykes Enters., Inc.*, No. 99-110, 1999 WL 1279651, at *4 (D. Or. June 30, 1999) (denying conditional certification based on Plaintiff's failure to demonstrate opt-in interest).

The *Parker* decision is instructive. In *Parker*, the two named plaintiffs moved to

conditionally certify a class of current and former delivery drivers who they claimed were denied overtime. *Parke*r, 492 F.Supp.2d at 1162. The *Parker* plaintiffs submitted declarations stating that they were informed and believed that other similarly situated plaintiffs existed, but failed to present any evidence that any similarly situated persons were interested in opting in to the litigation. *Id*. at 1165. The plaintiffs argued that they were unaware of the identities of other drivers, and therefore conditional certification was necessary in order to discover the identities of other drivers and subsequently contact them. *Id*. at 1166. The court rejected the plaintiffs' argument, holding that "an FLSA plaintiff is not entitled to conditional certification simply to seek out others who might wish to join the action." *Id*. Noting that one of the named plaintiffs had worked as a driver for the defendant for five years and undoubtedly knew other drivers, the *Parker* court held that it was not "an insurmountable hurdle" to require the plaintiffs to submit evidence that other drivers intended to join in their lawsuit. *Id*. at 1167. Because the plaintiffs failed to offer such evidence, the court denied their motion for conditional certification.

The present case is analogous to *Parker*. Here, as in *Parker*, there is one Plaintiff, Zaldivar, who claims to be similarly situated to a class of "current and former non-exempt employees of Lumber Liquidators employed in the United States from September 3, 2006 through the present." SAC ¶18. Plaintiff worked for Defendant for almost three (3) years, from July of 2007 to June of 2010. Plaintiff's Depo. 11:19-12:2. Plaintiff's own brother worked as a non-exempt retail store employee for Defendant. Plaintiff's Depo. 22:20-23:21. Plaintiff admittedly knew many other non-exempt retail store employees who worked in other stores for Defendant. Plaintiff's Depo. 39:21-41:6, 50:25-51:3, 52:13-15. Indeed, Plaintiff testified that, after news of his lawsuit spread, "people [from the other stores] started calling me" and "then I would explain to them about the overtime and that type things." Plaintiff's Depo. 224:4-18. Plaintiff spoke with employees from at least four (4) other Southern California stores about the claims in his lawsuit. Plaintiff's Depo. 224:4-225:10. Plaintiff also acknowledged in the declaration he submitted in support of his Motion that he had conversations with employees in "other stores in Los Angeles, Sacramento, Ventura and in Las Vegas, Nevada" regarding their bonuses/commissions and overtime. Plaintiff's Decl. ¶12. Plaintiff's's co-plaintiff, Crelencio Chavez, worked for

Defendant for almost ten (10) years. Chavez Depo. 196:21-197:12, 71:19-23 (attached as Exhibit 4 to Meckley Decl.). Chavez was a Store Manager and clearly knows the many non-exempt store employees who worked under his supervision.[5] Plaintiff's counsel, Tafoya & Garcia, also represents Defendant's former Regional Manager Kevin "Sam" Sullivan in various actions against Defendant, as well as a current Store Manager from Nevada. Meckley Decl. ¶8; Ex. 6. As a result of these representations, Plaintiff's counsel undoubtedly had access to the names and contact information of numerous other potential opt-ins. Yet, as in *Parker*, despite this knowledge of and communication with multiple other putative collective action members, not a single person has expressed any desire to participate in this litigation.

In the *Pfohl* decision, the court found that plaintiff's submission of 13 declarations out of potentially hundreds of opt-ins was insufficient to warrant conditional certification. In the present case, *more than one-thousand (1,000)* potential opt-ins exist. LLI Depo. 160:2-161:2. Plaintiff's failure to provide *even one* declaration or written consent demonstrates glaringly the lack of interest and desire on the part of other putative collective action members to participate in Plaintiff's lawsuit. As the court in *Parker* concluded, "in the absence of *at least some evidence* indicating that others will opt in to this lawsuit," there is "no basis to conclude that this is an 'appropriate case' for collective status—it is simply a lawsuit involving two plaintiffs." *Parker*, 492 F.Supp.2d at 1165-66 (emphasis added).

F. Equitable Tolling of the Statute of Limitations Is Neither Justified Nor Appropriate in This Case.

The FLSA statute of limitations runs until a valid consent is filed. 29 U.S.C. §256(b). Plaintiff asks the Court to deviate from the plain language of the statute and "equitably toll" the limitations period on the claims of the proposed collective action members from the date that the Complaint was filed on September 3, 2009, through the deadline for receipt of consent forms, or through June 16, 2010, when the Parties mediated the case. Motion 15:3-16:2. Plaintiff's request for equitable tolling should be denied.

[5] One presumes that Plaintiffs' shared with their counsel the names of the many current and former employees with whom they worked.

First, Plaintiff has not filed a written consent form in this action. As a result, as described above, there is no collective action presently pending before this Court. There is simply no legal basis to toll the statute of limitations for proposed members of a supposed "collective action" that to date has not even been commenced pursuant to Sections 216(b) and 256 of the FLSA.

Second, equitable tolling is "to be granted sparingly" and limited to those situations where "the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin v. Dep't of Veteran Affairs*, 498 U.S. 89, 96 (1990). Equitable tolling is not appropriate where the claimant simply "failed to exercise due diligence in preserving his legal rights." *Id*.

In *Veliz v. Cintas Corp*., 2007 WL 841776 *4 (N.D. Cal. 2007), the Northern District court explained that equitable tolling may be applied only when "the plaintiff is prevented from asserting a claim by wrongful conduct on the part of the defendant or when extraordinary circumstances beyond a plaintiff's control made it impossible to file a claim on time." *Veliz*, 2007 WL 841776 *4, citing *Irwin*, 498 U.S. at 96. Applying these principles, the court in *Veliz* denied the plaintiffs' request for equitable tolling of their FLSA claim, because there was no evidence that potential opt-in plaintiffs were induced or tricked by Cintas into filing their opt-in notices more than three years after the alleged overtime violations. The court stated that the plaintiffs failed to demonstrate the existence of "extraordinary circumstances" preventing them from timely filing their claims. *Veliz*, 2007 WL 841776 *5. *See also Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 1004 (9th Cir. 2006) (denying plaintiffs' request for equitable tolling absent evidence of wrongful conduct on the part of the defendant, or extraordinary circumstances beyond the plaintiff's control rendering timely filing impossible); *Scholar v. Pacific Bell*, 963 F.2d 264, 268 (9th Cir. 1992) cert. denied, 506 U.S. 868 (1992) ("there is no reason why a plaintiff should enjoy a manipulable open-ended time extension which could render the statutory limitation meaningless.").

Similarly, in *Delgado v. Ortho-McNeil, Inc.*, 2007 WL 2847238 (C.D. Cal. 2007), plaintiffs sought equitable tolling from the filing of the initial complaint, or at least from the filing

of the amended complaint that first asserted the FLSA cause of action, citing defendant's failure to provide contact information for potential opt-in plaintiffs. *Delgado*, 2007 WL 2847238 *4. The *Delgado* court noted that equitable tolling may be applied only: "(1) where the plaintiffs actively pursued their legal remedies by filing defective pleadings within the statutory period, or (2) where the defendant's misconduct induces failure to meet the deadline." *Delgado*, 2007 WL 2847238 *4, citing *Irwin*, 498 U.S. at 96. Analyzing the plaintiff's request, the *Delgado* court held that the failure to provide plaintiff with the contact information for potential class members was not sufficient to warrant equitable tolling as of the date of the filing of the Complaint, particularly in light of plaintiffs' delay of five months after filing their original complaint before seeking to add an FLSA cause of action, as well as their failure to request such contact information until six weeks after the certification motion was initially filed. *Delgado*, 2007 WL 2847238 *4.

Plaintiff claims equitable tolling is warranted because similarly situated plaintiffs, "through no fault of their own", have been unable to opt in to the lawsuit. Motion 15:11-14. Plaintiff cited only one case in support of his argument for equitable tolling: *Partlow v. Jewish Orphans' Home of Southern California, Inc.*, 645 F.2d 757, 760 (9th Cir. 1981), *abrogated on other grounds by Hoffmann-La Roche*, 493 U.S. 165, 110 S.Ct. 482. In *Partlow*, the Ninth Circuit held that the district court could toll the statute of limitations under the FLSA for forty-five days, in order to permit class members who had, due to attorney error, filed invalid consents, to execute proper consents. *Partlow*, 645 F.2d at 760. Although this holding was based largely on the court's finding that "it would simply be improper to deprive the consenting employees of their right of action," the court also noted that the defendant had been notified of the claims of the consenting employees within the statutory period because they had filed the improper consents. *Partlow*, 645 F.2d at 761.

Partlow is distinguishable from the instant case. Plaintiff here cannot demonstrate the existence of any circumstance warranting the application of equitable tolling. Plaintiff does not (and cannot) present evidence of any "wrongful act" or misconduct on the part of Defendant. The parties' participation in a mediation in no way impeded Plaintiff's ability to file his own written

consent form with this Court, or his ability to file written consent forms for any other employees who wished to participate in this case. As described above, Plaintiff personally spoke with many co-workers about this lawsuit and his overtime claim. Both Plaintiff and Chavez (and presumably their attorneys) personally know many of Defendant's employees, having worked for Defendant for a combined 12 years. Yet none of these co-workers has chosen to participate in this case. Defendant has not made any effort to prevent opt-in plaintiffs from learning of this action or to prevent Plaintiff or any other putative collective action member from filing a written consent with the Court. To the extent Plaintiff implies that he should have obtained contact information for potential collective action members from Defendant, it is clear that (a) he never raised this issue with the Court via any motion to compel, despite have more than 7 months to do so, and (b) he was not entitled to any such information because, as described above, there is no collective action presently pending before this Court because Plaintiff never filed a written consent as required by Sections 216(b) and 256.

It is also clear that no "extraordinary circumstances" exist that have prevented Plaintiff from filing his consent form. Plaintiff filed this action 16 months ago -- he cannot credibly claim that he has had insufficient time or opportunity to comply with his statutory obligations. It is Plaintiff's and/or his attorneys' own negligence in prosecuting this action that has put them in their current position, and the Court should not reward such negligence by granting equitable tolling when none of the criteria for application of this doctrine have been established.

G. Plaintiff Cannot Maintain Both a Rule 23 Opt-Out Class Action and a 216(b) Collective Action Predicated on the Same Alleged Overtime Violation.

In the SAC, Plaintiff seeks to maintain a Rule 23 class action based upon the alleged failure to include commissions/bonuses in the overtime calculation under California law (SAC ¶¶18, 32, 33) and seeks to maintain an FLSA collective action based upon the same alleged practice (SAC ¶¶18, 40, 45). Thus, Plaintiff seeks to have California current and former employees to be included in both an opt-in and an opt-out procedure. The Court should not allow these conflicting procedures to be applied to the California non-exempt class/collective action members.

The federal Rules Enabling Act, 28 U.S.C. § 2072, prohibits using a procedural rule – such as Rule 23 – to abridge substantive rights. Section 216(b) of the FLSA grants employees a substantive right to choose whether they wish to "opt-in" to a collective action. On the other hand, a Rule 23 class action binds all class members who do not request exclusion from a suit. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974).

Here, the application of Rule 23 as to Plaintiff's FLSA claim would deprive California putative class members of their right under Section 216(b) to not have their statutory claims litigated without their written consent. Moreover, FLSA class members must be notified that they cannot participate in the lawsuit unless they opt in (29 U.S.C. §216(b)), while the opt-out action requires notice to the same class members that they will be bound by the very same lawsuit unless they opt out.

The two notice requirements are inherently incompatible. *Leuthold v. Destination America, Inc*., 224 F.R.D. 462, 470 (N.D. Cal. 2004) ("the policy behind requiring FLSA plaintiffs to opt-in to the class would largely be thwarted if a plaintiff were permitted to back door the shoehorning in of unnamed parties through the vehicle of calling upon similar state statutes that lack such an opt-in requirement"); *Herring v. Hewitt Assoc., Inc*., 2006 WL 2347875, at *2 (D. N.J. 2006); *Edwards v. City of Long Beach*, 467 F. Supp. 2d 986, 993 (C.D. Cal. 2006) (opt-out class for state law overtime claims "would frustrate the purpose of requiring plaintiffs to affirmatively opt-in to § 216(b) collective actions"). Thus, Plaintiff cannot maintain a Rule 23 class action as to the very same claim that underpins his FLSA claim.

H. <u>In The Event That This Court Grants Conditional Certification, Plaintiff Should Not Be Granted The Relief Requested.</u>

1. Given The Absence Of Evidence Of Any Willful Violation By Defendant, The Statute Of Limitations For Plaintiff's FLSA Collective Action Should Be Limited To Two Years.

The standard statute of limitations under the FLSA is two years. 29 U.S.C. §255(a). A three-year statute of limitations is applicable only in the case of a "willful violation" of the FLSA. *Id.; McLaughlin v. Richland Shoe Co*., 486 U.S. 128, 135 (1988). Any notice distributed to putative collective action members should be limited to the two years limitations period

proscribed by the FLSA, absent a showing by Plaintiff of a "willful violation" by Defendant. *Id*. Despite bearing the burden, Plaintiff has not provided any factual information from which this Court could even preliminarily find a willful violation. *See Herman v. RSR Security Serv. Ltd*., 172 F.3d 132, 141 (2d Cir. 1999). Furthermore, the limitations period should run for two years from the date that the Notice is issued, not the date Plaintiff's SAC was filed, because, as set forth *supra*, the limitations period is tolled only when the "consent to join" form is filed with the Court –a statutory requirement that Plaintiff has failed to satisfy here. *See* 29 U.S.C. §§ 255, 256; 29 C.F.R. §790.21(b)(2).

2. Any Opt-In Notice Sent To Putative Collective Action Members Must Be Court Supervised, Administered By A Third Party, and Result From The Parties' Meeting And Conferring.

Even if conditional certification were granted, contact with other non-exempt retail employees should be supervised by the Court pursuant to Section 216(b) and done using a third-party administrator. *Prentice v. Fund for Pub. Interest Research, Inc*., 2007 WL 2729187, at *5 (N.D. Cal. 2007) ("The Court agrees that using a third party is the best way to ensure the neutrality and integrity of the opt-in process"). Thus, Plaintiff's request for "names, contact information, and other identifying information" should be denied.

A third-party claims administrator, rather than Plaintiff's counsel, should have access to the contact information of putative collective action members to prevent improper follow-up solicitations beyond the even-handed notice that would be approved by the Court. *See, e.g., Lewis v. Wells Fargo & Co.*, 669 F. Supp. 2d 1124, 1128 (N.D. Cal. 2009) (ordering collective action notice to be distributed by a third-party administrator rather than plaintiff's counsel); *Adams v. Inter-Con Sec. Sys*., 2007 U.S. Dist. LEXIS 83147, at *11 (N.D. Cal. 2007). *See also Torres v. CSK Auto, Inc*., 2003 U.S. Dist. LEXIS 25092, at * 9 (W.D. Tex. 2003) (denying plaintiffs' request for names and addresses of putative collective action members and ordering defendants to send notice instead).

Moreover, the Court should deny Plaintiff's request to use the notice attached to his moving papers, and instead order the parties to meet and confer on the form of notice, as is typical in FLSA collective actions. *See, e.g., Kalish v. High Tech Institute, Inc*., 2005 WL

1073645 *5 (D. Minn. 2005) (directing the parties to meet and confer and agree to a form of notice); *accord Edwards v. City of Long Beach*, 467 F. Supp. 2d 986, 993 (C.D. Cal. 2006); *Jackson v. City of San Antonio*, 220 F.R.D. 55, 63 (W.D. Tex. 2003); *Tucker v. Labor Leasing, Inc*., 872 F. Supp. 941, 950 (M.D. Fla. 1994).

If this Court orders that a notice should be sent, Defendant respectfully requests that the Court reject the proposed notice attached to Plaintiff's Motion, and instead follow the typical procedure of ordering the parties to meet and confer to devise a mutually acceptable and accurate notice. *See, e.g., Jackson v. City of San Antonio*, 220 F.R.D. 55, 63 (W.D.Tex. 2003) (ordering the parties to "meet and confer upon the contents of the notice and consent form and provide a joint proposed notice and consent form to the Court"); *Tucker v. Labor Leasing, Inc*., 872 F. Supp. 941, 950 (M.D. Fla. 1994) (same); *Carter v. Newsday, Inc*., 76 F.R.D. 9, 16 (E.D.N.Y. 1976) (same).

Defendant has numerous serious concerns with Plaintiff's proposed Notice – it is neither accurate nor reasonable. First, Plaintiff's proposed Notice mischaracterizes the putative collective class as "employees classified as non-exempt employees who were employed in the United States from September 3, 2006 through the present, who were paid overtime wages and were also paid commission wages and/or other non-discretionary incentive pay or bonuses." Garcia Decl., Exh. B. This definition impermissibly extends beyond the putative class defined in the SAC, which is limited to "non-exempt *retail store* employees (including, but not limited to assistant store managers, sales associates, and warehouse associates)." SAC ¶18 (emphasis added). Plaintiff never worked in any location other than a retail store and has not presented any rationale for including non-retail store employees. Second, Plaintiff's proposed Notice extends the purported notice period two and a half years beyond the applicable statute of limitations. Because Plaintiff failed to file a written consent, and has failed to demonstrate a willful violation by Defendant, at best, the statute of limitations and notice period can extend back to only January of 2009, as opposed to September 2006 as Plaintiff proposes. Third, Plaintiff's Notice purports to inform employees "of a collective action and class action lawsuit". Given that this is a Section 216(b) claim, it is not appropriate to refer to it as a "class action". Fourth, the Notice unfairly

contains no information regarding Defendant's counsel, in the event that an employee desired to communicate with Defendant's counsel to obtain additional information.

Accordingly, if the Court orders notice of any kind, Defendant respectfully requests that the Court direct the Parties to meet and confer and submit a mutually agreeable notice within 30 days of the Court's Order. If the Parties cannot agree, they should be ordered to submit their separate proposals for the Court's decision.

3. In the Event That This Court Grants Conditional Certification, the Notice Period Should Be Limited To No More Than Sixty Days.

Any notice provided to potential opt-ins should require a response not later than sixty (60) days from the date of mailing, as opposed to the one-hundred and twenty day period proposed by Plaintiff. This would be consistent with the applicable case law. *See Martinez v. Cargill Meat Solutions*, 265 F.R.D. 490 (D. Neb. 2009) (denying plaintiff's request for 120 day notice period in favor of 45 day period absent evidence that the "putative plaintiffs are a transient population, or that due to vocation, they may not timely receive their mail."); *Luque v. AT & T Corp*., 2010 WL 4807088 (N.D. Cal. 2010) (ordering a 60-day notice period for class members to opt-in); *Labrie v. UPS Supply Chain Solutions, Inc*., 2009 WL 723599 *8 (N.D. Cal. 2009) (rejecting plaintiffs' request for a 120 day deadline in favor of a 60 day deadline); *Delgado v. Ortho-McNeil, Inc*., 2007 WL 2847238 *4 (C.D. Cal. 2007) ("Sixty days is sufficient time for a class member to receive the notice, ask any questions of Plaintiffs or their counsel, and make an informed choice as to whether or not they wish to participate.").

4. Any Notice Distributed To Putative Collective Action Members Should Be Sent Only By First Class Mail.

Plaintiff seeks not only to mail nationwide notice, but to post the notice at each and every Lumber Liquidators location across the country. However, such posting of notice is unnecessary and overly intrusive absent some evidence that first-class mail will be insufficient. The case law supports Defendant's position. *See Barnett v. Countrywide Credit Indus.*, 2002 WL 1023161, at *2 (N.D. Tex. May 21, 2002) ("[M]ailing the notice to the potential class members, rather than also posting them at Defendant's offices, is sufficient to provide the potential opt-in plaintiffs with

notice of the suit."); *Reab v. Electronic Arts, Inc*., 214 F.R.D. 623 (D. Colo. 2002) (denying the plaintiff's request for notice via email and posted to an electronic website, given that, "first class mail ensures, at the outset, that the appropriately targeted audience receives the intended notification and maximizes the integrity of the notice process."); *DeKeyser v. Thyssenkrupp Waupaca, Inc*., 2008 U.S. Dist. LEXIS 102318 *18 (E.D. Wis. 2008) (same).

IV. CONCLUSION

Plaintiff has failed to meet his burden of proof to show that conditional certification of a collective action under the FLSA would be appropriate in this case. Based upon the foregoing, Defendant requests that the Court deny Plaintiff's Motion with prejudice; and further requests that the Court order all further relief in favor of Defendant that the Court finds appropriate.

Dated: December 30, 2010

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